In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 899

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–10) is reported at 384 F. 2d 55. The Board's decision and order (R. 62–74, 35–57)[1] are reported at 150 NLRB 158.

JURISDICTION

The opinion of the court of appeals was rendered on September 29, 1967 (Pet. App. 1). The petition for

[1] "R." references are to the materials contained in Volume I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Volume II of the record; "G.C. Exh." refers to the General Counsel's exhibits.

a writ of certiorari was filed on December 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the union committed an unfair labor practice by insisting, as a condition to entering into a collective bargaining agreement, that the employer provide a cash bond that would cover actual and liquidated damages resulting from a default by him or his subcontractors in providing the employee benefits specified in the contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 11 of the Appendix to the petition.

STATEMENT

In June 1962, petitioner Union presented a proposed new collective bargaining contract to E. L. Boggs Plastering Company ("Boggs") (R. 39; Tr. 166–168, G.C. Exh. 7).[2] Article X of the contract contained the following provision (G.C. Exh. 7, p. 13):

> A cash bond in the amount of One Thousand Dollars ($1,000) shall be deposited by the individual Contractor with the Joint Conference Board, or a trustee designated by the Joint Conference Board. Said bond shall be liable for any assessment for wages, vacation payments, liqui-

[2] The previous agreement between Boggs and the Union had expired on May 31, 1962 (R. 39; Tr. 91).

> dated damages as provided for in this Agreement, and/or contributions for medical, hospital, welfare and life insurance plans, pension plan and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Contract.[3]

The contract further provided that both liquidated and actual damages could be assessed against the bond if the contractor failed to make the monthly contributions or reports to the health and welfare, pension, and vacation funds required by the contract (R. 48–49; G.C. Exh. 7, pp. 10, 13, 14). The contractor's bond also covered any failure of a subcontractor to pay his employees the wages and benefits provided in the agreement (R. 48–49; Tr. 202).[4]

Boggs declined to sign the contract and designated a multi-employer association to represent it in negotiations with the Union (R. 39; Tr. 93–94, 96–97). The parties held four bargaining sessions, from July through December 1962 (R. 63; Tr. 55, 68, 74). Throughout the meetings, the Union demanded, and Boggs opposed, the performance bond clause (R. 39–40, 42, 44–45; Tr. 55–56, 59, 62–63, 76, 78–79, 178–179, 196).

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[3] The contract empowered the Joint Conference Board (composed of seven contractors and seven union representatives) to invest up to 75 percent of the cash bonds deposited (G.C. Exh. 7, pp. 14, 17). After payment of expenses, fees, and taxes, the balance of the income derived from such investments was to be distributed to the pension fund, and could not be used to meet assessments against the bonds for employee benefits due under the agreement (G.C. Exh. 7, p. 15).

[4] The agreement permitted a contractor to subcontract under certain conditions (G.C. Exh. 7, p. 2).

In October 1962, the Union threatened to strike unless Boggs signed the contract (R. 45; Tr. 97). On January 3, 1963, the Union picketed a job site where Boggs was working (R. 46; Tr. 105–106). The next day, Elmer Boggs, the owner of the Company, agreed to the contract. It was understood that in lieu of providing a cash bond he could give a certified check, which would be held uncashed until the Union and the multi-employer bargaining group agreed upon a bond for the group (R. 46; Tr. 108–109).[5] Boggs did not deliver the check, and on March 21, 1963, the Union resumed picketing (R. 46; Tr. 116). The next day, Boggs gave the Union the check, and the Union stopped picketing (R. 46; Tr. 116).

The Board held that the bond clause was not a mandatory subject of bargaining under the Act; that the Union had insisted on the inclusion of such a clause as a condition of reaching an agreement on mandatory subjects; and that such insistence constituted a refusal to bargain, in violation of Section 8(b)(3) of the Act (R. 48–49, 71). The Board ordered the Union to cease and desist from insisting that Boggs comply with the bond clause of the contract, to return the check to Boggs or to refund its face value plus interest, and to post appropriate notices (R. 72).

The court of appeals enforced the Board's order (Pet. App. 1–3). The court held that substantial evidence supported the Board's finding that the Union

[5] The so-called area contract provided that, in lieu of the $1,000 cash bonds required of individual employers, multi-employer cash bonds of $10,000 and $20,000 might be furnished (G.C. Exh. 7, p. 13, Art. X, B).

insisted upon the posting of a performance bond as a condition of an agreement with Boggs (Pet. App. 1, 7). The court (with Judge Ely dissenting on this issue) also sustained the Board's determination that the performance bond was not a mandatory subject of bargaining. The court stated that the Board "did not hold all performance bond clauses to be nonmandatory subjects of bargaining," and that the clause here involved "would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer" (Pet. App. 2).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with other decisions. There is no occasion for further review.

1. The holding of the court of appeals that the performance bond clause was not a mandatory subject of bargaining because it did not relate to "wages, hours, and other conditions of employment" is in accord with the decisions of five other courts of appeals that have upheld the Board on this issue.[6] This Court repeatedly has declined to review such rulings (*supra*, n. 6), and there is no greater reason for review here.

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[6] *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), certiorari denied, 340 U.S. 811; *Standard Generator Service Co.* v. *National Labor Relations Board*, 186 F. 2d 606 (C.A. 8); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251 (C.A. 5); *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.* (C.A. 10), No. 6125, Jan-

Petitioners (Pet. 18–21) and the dissenting judge below would distinguish those cases on the ground that the purpose of the clause here was to insure compliance by the employer with its contractual obligations to its employees. As the court of appeals pointed out, however, the Board found that the clause "would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer" (Pet. App. 2). The requirement that the employer pay liquidated damages for its failure to make prompt payments or reports to the various trust funds goes beyond the mere protection of the wages and other benefits accorded the employees in the bargaining unit covered by the contract. Such damages were in addition to any actual damages suffered by unit employees from the employer's default, and the extra amount was payable into trust funds for the benefit of all employees covered by the so-called area contract. Simi-

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uary 19, 1961, 47 LRRM 2480, certiorari denied, 366 U.S. 914; *National Labor Relations Board* v. *Davison*, 318 F. 2d 550 (C.A. 4); *Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A. D.C.), certiorari denied, 368 U.S. 824; *National Labor Relations Board* v. *American Compress Warehouse, Division of Frost-Whited Co.*, 350 F. 2d 365 (C.A. 5), certiorari denied, 382 U.S. 982; *Carpenters District Council of Detroit* v. *National Labor Relations Board*, 58 LRRM 2064 (C.A. D.C.), enforcing 145 NLRB 663.

See, also, *Jasper Blackburn Products Corp.*, 21 NLRB 1240; *Scripto Mfg. Co.*, 36 NLRB 411; *Interstate Steamship Co.*, 36 NLRB 1307; *Dalton Telephone Co.*, 82 NLRB 1001; *International Brotherhood of Teamsters, Local 294 (Conway's Express)*, 87 NLRB 972, affirmed on other grounds *sub nom. Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906 (C.A. 2).

larly, the requirement that the employer guarantee the wages and other benefits of the employees of subcontractors does not relate to the "wages, hours and other terms and conditions of employment" of the members of the bargaining unit. Cf. *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666; *National Labor Relations Board* v. *Davison,* 318 F. 2d 550, 557 (C.A. 4).

2. Petitioners contend (Pet. 8–14) that, since the performance bond clause itself was not illegal, the Union could properly exert economic pressure to obtain such a clause whether or not it related to "wages, hours and other terms and conditions of employment" (Pet. App. 11). This contention is foreclosed by *National Labor Relations Board* v. *Borg-Warner Corp.,* 356 U.S. 342. There this Court distinguished between mandatory subjects of bargaining, *i.e.,* those relating to "wages, hours, and other terms and conditions of employment," as to which bargaining is required but "neither party is legally obligated to yield"; and permissive subjects of bargaining, *i.e.,* those relating to other legal demands, as to which either side may make proposals but cannot "lawfully insist upon them as a condition to any agreement." 356 U.S. at 349. The Court has continued to recognize this distinction. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 210; *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689. The fact that the Union sought to attain its demand for a nonmandatory subject by picketing and a strike threat is immaterial;

although the Act accords these economic weapons a special solicitude, they are not protected where, as here, they are used to further an illegal bargaining objective. See *Local 164, Brotherhood of Painters* v. *National Labor Relations Board,* 293 F. 2d 133 (C.A.D.C.), certiorari denied, 368 U.S. 824, cited with approval in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 697, 712, n. 19 (dissenting and concurring opinion of Mr. Justice Goldberg).

3. There is likewise no merit to petitioners' argument (Pet. 14–17) that the Union properly could press its demands relating to the nonmandatory subject of bargaining because it was, at the same time, also insisting on mandatory subjects. Where insistence on a nonmandatory subject has contributed to an impasse in the bargaining, as petitioners' insistence on the performance bond clause admittedly did here, it is immaterial that the nonmandatory subject was not the only issue on which the parties had not reached agreement. *National Labor Relations Board* v. *American Compress Warehouse, Division of Frost-Whited Co.,* 350 F. 2d 365, 369 (C.A. 5), certiorari denied, 382 U.S. 982; *Industrial Union of Marine and Shipbuilding Workers of America* v. *National Labor Relations Board* (*Bethlehem Steel Co.*), 320 F. 2d 615, 618 (C.A. 3), certiorari denied, 375 U.S. 984; *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *National Labor Relations Board,* 331 F. 2d 720, 728 (C.A. 6), certiorari denied, 379 U.S. 888. "It is the *tendency* of such proposals [on nonmandatory subjects] to 'delay or impede or otherwise circumscribe the bargaining process,' which renders [insistence

upon] them improper." *International Brotherhood of Teamsters, Local 294 (Conway's Express)*, 87 NLRB 972, 979, affirmed on other grounds *sub nom. Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906 (C.A. 2). Petitioners' hypothetical dilemmas (Pet. 16–17) about how a union could strike in support of proposals on mandatory subjects when a nonmandatory subject is still under negotiation or how it could withdraw a nonmandatory bargaining proposal once impasse has been reached, may be avoided by the simple expedient of not coupling demands relating to the statutory subjects of bargaining with those involving a nonmandatory subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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